



UPPER SEVEN LAW
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May 14, 2025

Molly C. Dwyer, Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: Rule 28(j) Letter in *Imperial Sovereign Court of the State of Montana v. Knudsen*, No. 23-3581 (oral argument held June 4, 2024)

Dear Ms. Dwyer,

Plaintiffs respectfully submit this Rule 28(j) letter to notify the Court of the Eleventh Circuit's decision in *HM Florida-ORL, LLC v. Governor of Florida*, __ F.4th __, 2025 WL 1375363 (11th Cir. May 13, 2025) ("*Hamburger Mary's*"). In *Hamburger Mary's*, the Eleventh Circuit upheld a preliminary injunction against a Florida law that, like HB 359, prohibits allowing children to attend "adult" performances and arose from hostility to drag. *Id.* at *1–2.

The court rejected the same arguments that Montana makes in support of HB 359.

- First, the court held that the plaintiff suffered injury-in-fact in the form of self-censorship because the law (1) was enacted recently, *id.* at *4; (2) used vague and undefined terms (including "lewd"), *id.* at *5;

(3) threatened “grievous” penalties, including license suspension, fines, and misdemeanor prison sentences, *id.*; and (4) would likely be enforced absent express disavowal of enforcement, *id.*

- Second, the court held that the injury was traceable to the defendant, a “government official[] with the authority to enforce [the] law,” when enforcement proceedings would be filed by individuals overseen by and answerable to the named defendant. *Id.* at *9.
- Third, the court held that obscenity restrictions on speech directed to minors must comply with the *Miller* test, *id.* at *15–16, which is not met when the speech proscribed is vaguely defined and includes “lewd conduct,” *id.* at *16–21.
- Fourth, the court held that the Florida law’s unconstitutional applications outweigh its legitimate sweep and that the law is therefore facially unconstitutional under the *Moody* test for First Amendment challenges. *Id.* at *21–30.
- Fifth, the court affirmed the statewide injunction against the facially unconstitutional law. *Id.* at *30–33.

To the degree that pertinent differences separate the Florida law and HB 359, they further support Plaintiffs’ position. Unlike the Florida

law, HB 359 does not even attempt to incorporate the *Miller* for minors framework. *See id.* at *35–41, *47–49 (Tjoflat, J. dissenting). Nor does it include a scienter requirement to “protect[] those who act reasonably and in good faith.” *Id.* at *49.

Sincerely,

/s/ Constance Van Kley
Constance Van Kley
Counsel for Plaintiffs-Appellees